

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GOOD LUCK LIQUOR, INC.	:	DETERMINATION
AND ZHONG XIANG TIAN	:	DTA NOS. 816578
	:	AND 816579
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1993 through November 30, 1995.	:	

Petitioners, Good Luck Liquor, Inc., 369 Nostrand Avenue, Brooklyn, New York 11216 and Zhong Xiang Tian, 60-06 84th Street, Elmhurst, New York 11373, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1993 through November 30, 1995.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 7, 1999 at 10:30 A.M., with all briefs to be submitted by May 11, 1999, which date began the six-month period for the issuance of this determination. Petitioners appeared by Leslie S. Fields, CPA.¹ The Division of Taxation appeared by Terrence M. Boyle, Esq. (Gary R. Palmer, Esq., of counsel).

¹Mr. Bert Fields also participated in the hearing held in this matter on behalf of petitioners. However, the powers of attorney filed for petitioners list only Leslie S. Fields as petitioners' representative.

ISSUES

I. Whether the indirect audit methodology utilized by the Division of Taxation was reasonable.

II. Whether petitioners have shown reasonable cause for abatement of penalties.²

FINDINGS OF FACT

1. Petitioner Zhong Xiang Tian was the president of petitioner Good Luck Liquor, Inc. (“Good Luck Liquor”) during the audit period and remained the president at the time of the hearing in this matter. Good Luck Liquor was a liquor store located in Brooklyn, New York.

2. The Division of Taxation (“Division”) commenced a sales tax audit of Good Luck Liquor’s business, and on November 8, 1995 an appointment letter was sent to Good Luck Liquor by Martha Heyliger, Tax Auditor I, Sales Tax, the auditor in this matter. The letter provided that:

All books and records pertaining to your Sales and Use Tax liability for the period under audit are to be available on the appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates. . . .

During the course of the audit, you may be required to furnish additional records and/or information.

The period under audit was listed as December 1, 1992 through November 30, 1995. The date scheduled for the appointment was December 4, 1995.

3. In response to the appointment letter, the auditor received a telephone call from Leslie S. Fields on December 4, 1995, the date of the scheduled appointment. Mr. Fields stated that he was the representative of Good Luck Liquor and requested that the audit appointment be

²Petitioners did not assert any proposed adjustments to the audit results, nor did petitioner Zhong Xiang Tian contest his status as a responsible officer of petitioner Good Luck Liquor, Inc. Therefore, these issues are not addressed in this determination.

postponed until after April of 1996. The auditor explained that the appointment could not be postponed that long. Mr. Fields was to go over some records and telephone the next week to set up a new appointment date.

4. On December 6, 1999 the auditor mailed third-party verification forms to petitioners' suppliers requesting information on Good Luck Liquor's purchases for the audit period.

5. On January 31, 1996, the auditor sent another appointment letter to Good Luck Liquor scheduling an appointment for February 9, 1996. This letter contained the same request for records as the November 8, 1995 appointment letter. This appointment was also not kept. The auditor next spoke with Mr. Fields on February 20, 1996 during a telephone conversation where he again requested a postponement until after tax season. During this telephone conversation the appointment was rescheduled for March 5, 1996.

6. On March 4, 1996, Mr. Fields telephoned the auditor and stated that he could not make the appointment because he did not have a power of attorney. The auditor explained that a power of attorney was not required for the representative to provide records to the auditor. At this point Bert Fields, Mr. Fields's father, spoke with the auditor and explained that he had not received any records from Good Luck Liquor and he would call the auditor the next day.

7. No one appeared at the scheduled appointment on March 5, 1996 and no one called to cancel or reschedule.

8. On March 8, 1996 the auditor mailed another appointment letter directly to Good Luck Liquor scheduling the appointment for March 22, 1996. This letter contained the same request for records as the previous two appointment letters. On the same date the auditor also sent Good Luck Liquor a letter explaining the history of the previous appointments and stating that, if the Division did not hear from Good Luck Liquor within two weeks, assessments would be issued.

Both of these letters were sent by certified mail. No one appeared or telephoned on the scheduled appointment date of March 22, 1996.

9. On May 21, 1996 Bert Fields appeared at the Division's offices. He stated that Good Luck Liquor had not provided him with any records. He did have Good Luck Liquor's Federal tax returns, but had not brought those with him either. At that time he also submitted a power of attorney naming Leslie Fields as the representative of Good Luck Liquor. Bert Fields explained that Leslie Fields was on vacation and would telephone the auditor when he returned to schedule another appointment.

10. During the next several months the auditor left several messages on Leslie Fields's answering machine. On July 12, 1996, Leslie and Bert Fields appeared at the Division's offices. They submitted the 1992, 1993 and 1994 Federal tax returns of Good Luck Liquor, but no other documents of any kind. When asked if any records existed they answered no. However, on more specific questioning, Leslie Fields stated that he had the records used to prepare the Federal tax returns, some sales records, a few purchase invoices and some cash register tapes. He stated that cash register tapes were not available for the entire audit period. Leslie Fields stated that he would bring the records and scheduled another appointment for August 6, 1996. On July 16, 1996 the auditor left a message on the answering machine of Leslie Fields and spoke with an employee of Good Luck Liquor on the telephone. The auditor left a message for the owner that no records had been received by the Division and for him to contact her.

11. On July 18, 1996 the auditor sent a letter to Leslie Fields with a photocopy to Zhong Xiang Tian explaining that the records must be brought to the August 6, 1996 appointment and that since they had once more requested additional time to provide records, it was necessary for

petitioners to sign a consent to extend the statute of limitations. The auditor included two such consents with her letter, one for Good Luck Liquor and one for Zhong Xiang Tian personally.

On July 26, 1996 the auditor again called Leslie Fields and the business of Good Luck Liquor explaining that the owner or the representative had to call back. Bert Fields called and said they did not have records, that they would sign the waivers and requested the names of Good Luck Liquor's suppliers.

12. Leslie Fields appeared at the offices of the Division on August 6, 1996. He again did not bring any records, but he did execute a consent to extend the statute of limitations for Good Luck Liquor and informed the auditor that he would have Zhong Xiang Tian execute the individual consent and return it to the auditor. The individual consent was received at the offices of the Division on August 8, 1996. Mr. Fields stated he would be meeting with his client the next day to get the records together.

13. On August 15, 1996 Leslie Fields and James Tian, Zhong Xiang Tian's son, attended a meeting at the offices of the Division. It was determined at that meeting that there were no cash register tapes or purchase invoices available. There were, however, check stubs available from April of 1993 through March of 1995 and bank statements which were to be provided to the Division later. The sales tax returns for the period in question were prepared from bank deposits.

The check stubs showing purchases made were later provided to the Division. Leslie Fields informed the auditor that there were cash purchases also, but he did not provide any documentation of cash purchases. No bank statements were provided.

14. On November 13, 1996 the Division issued a Statement of Proposed Audit Adjustment setting forth tax due of \$74,191.01, interest of \$25,808.24 and penalty of \$21,512.31 for a total due as of that date of \$121,511.56.³

15. During the time period from November 8, 1995, when the initial appointment letter was dated, through November 13, 1996, when the Statement of Proposed Audit Adjustment was issued, the auditor had conducted the audit by first verifying Good Luck Liquor's purchases for the audit period with the suppliers. This was initiated with the forms mailed to the suppliers on December 6, 1995 and then followed up by the auditor until all requested information on Good Luck Liquor's purchases had been provided. Pursuant to the information provided by the suppliers the auditor calculated Good Luck Liquor's purchases for the entire audit period to be \$1,688,682.00.

16. Starting with total purchases of \$1,688,682.00 the auditor subtracted 1% (\$16,887.00) for a pilferage allowance since petitioners claimed there was some loss due to theft. The auditor then subtracted \$223,810.00 from the total purchases as Good Luck Liquor's ending inventory pursuant to its Federal tax return for 1994.⁴ This resulted in adjusted purchases of \$1,447,985.00.

17. The auditor then applied a markup percentage to the adjusted purchases to arrive at the adjusted gross taxable sales. The markup percentage utilized by the auditor was taken from a study entitled "Cost of Doing Business, Corporations, Fiscal Year July 1984 - June 1985" compiled by The Dun & Bradstreet Corporation ("Dun & Bradstreet"). The study computed

³There was no tax due for the period December 1, 1992 through February 28, 1993 (*see*, footnote "5").

⁴There was no beginning inventory to subtract from the ending inventory to reach an inventory adjustment since the business began in 1992.

“operating ratios for 191 lines of business” which were to “provide a guide as to the average amount spent by corporations” for the items listed. The data was derived from “a representative sample of the total of all Federal Income Tax Returns filed for 1984.” One of the lines of business listed was “Liquor stores,” which showed the following ratios as a percentage of business receipts: Cost of Sales - 79.40%; Gross Margin - 20.60%. The auditor then divided the gross margin by the cost of sales to arrive at a markup percentage as follows: $20.60\% \div 79.40\% = 25.94\%$. Then, the auditor reduced the markup percentage by 3% to 22.94% based upon Good Luck Liquor’s assertions that it was a large volume type of business.

18. The auditor then applied the markup percentage of 22.94% to Good Luck Liquor’s adjusted purchases of \$1,447,985.00 to arrive at adjusted gross taxable sales of \$1,780,153.00. Subtracting the taxable sales reported by Good Luck Liquor on its sales tax returns for the audit period of \$880,869.00, the auditor determined additional taxable sales for the audit period of \$899,284.00. Applying the applicable tax rate resulted in \$74,190.91 in tax due.

19. The auditor noted during her testimony at the hearing that she had also calculated Good Luck Liquor’s markup by utilizing information from the Federal tax returns: gross profit divided by cost of goods sold. The average markup utilizing these figures for the three years was 24.39%.

20. Penalties were asserted because of the large discrepancy between sales as reported on Good Luck Liquor’s sales tax returns and adjusted sales as determined on audit. Furthermore, the auditor determined that reasonable cause for abatement of penalties did not exist.

21. On October 22, 1996 Zhong Xiang Tian and Leslie Fields attended a meeting at the offices of the Division to discuss the audit findings.

22. On November 29, 1996 the Division issued to Good Luck Liquor a Notice of Determination for the period March 1, 1993 through November 30, 1995⁵ setting forth tax due of \$74,191.01, interest of \$26,335.57 and penalty of \$21,727.05 for a total due as of that date of \$122,253.63.

23. On March 10, 1997 the Division issued to Zhong Xiang Tian a corresponding Notice of Determination as officer of Good Luck Liquor for the period March 1, 1993 through November 30, 1995 setting forth tax due of \$74,191.01, interest of \$26,335.57 and penalty of \$21,727.05 for a total due as of that date of \$122,253.63.

24. The Division obtained consents to extend the statute of limitations executed by petitioner Good Luck Liquor in February and August of 1996 extending the period available within which to assess until December 20, 1996. The Division obtained a consent to extend the statute of limitations executed by petitioner Zhong Xiang Tian in August of 1996 extending the period available within which to assess until December 20, 1996. In its brief filed in this matter the Division conceded that the first three quarters (i.e., the period March 1, 1993 through November 30, 1993) set forth in the notice of determination issued to Zhong Xiang Tian are time barred (*see*, Tax Law § 1147).⁶

25. James Tian testified at the hearing. James is the son of petitioner Zhong Xiang Tian. James worked at Good Luck Liquors if his father or cousin was not available.

⁵There was no additional tax determined to be due for the initial sales tax quarter of the audit period, December 1, 1992 through February 28, 1993. When the adjusted purchases were applied to this quarter the result was a negative amount of purchases which was carried forward to the next quarter.

⁶It is also noted that at the time Zhong Xiang Tian signed the consent in August of 1996, the first quarter (i.e., March 1, 1993 through May 31, 1993) set forth in the notice was already time barred.

26. James Tian testified that Good Luck Liquor had gross lottery sales of \$6,000.00 weekly, that the lottery paid Good Luck Liquor 6% of its gross lottery sales and that this money was deposited into the sole business checking account.⁷

27. James Tian testified that his father and cousin did not speak English well and this caused problems when they ordered liquor. James explained that suppliers would attempt to deliver orders that were not what Good Luck Liquor thought was ordered and Zhong Xiang Tian would have the orders returned. However, James further testified that his father probably paid some bills on these purchases even though they were returned.

28. James Tian testified that Good Luck Liquor was located in a neighborhood with several large discount liquor stores. He further testified that his father had told him in order to be competitive, Good Luck Liquor utilized a markup of less than 14%.

29. Petitioners were allowed time after the close of the hearing to submit an affidavit from Zhong Xiang Tian concerning the issue of whether there exists reasonable cause to abate penalties in this matter. A statement⁸ of Zhong Xiang Tian was submitted. In his statement, Mr. Tian explained that he had been injured in China in 1992 in an automobile accident, and as a result, during the audit period he experienced trouble walking and was in a great deal of pain making it difficult to attend properly to his business. He explained that he had to have help from relatives that were not familiar with bookkeeping or tax laws.

Zhong Xiang Tian's statement explained that a leak in the roof of the building housing Good Luck Liquor was caused during a rain storm in the "latter part of 1996." He stated that the store and

⁷This would amount to \$360.00 per week or \$18,720.00.

⁸As pointed out by the Division, the document submitted by petitioner is technically not an affidavit and is therefore referred to as a statement.

the inventory were damaged and all Good Luck Liquor's records were destroyed including bills, check statements and daily logs. These records were kept on shelves in the store.⁹

SUMMARY OF THE PARTIES' POSITIONS

30. Petitioners assert that the Division requested information from the suppliers prior to reviewing any information they provided and that the Division would have utilized the suppliers' information regarding purchases even if complete books and records existed if such books and records did not agree with the information from the suppliers. Petitioners argue that the Division should at least have audited the records of the suppliers to insure such records were correct instead of merely relying on the information provided by the suppliers in response to the Division's requests.

Petitioners argue that the audit was not reasonable because the markup was based on a Dun & Bradstreet study for the year 1984 which was approximately 10 years prior to the audit period. Furthermore, the study is based upon Federal income tax data, was not a scientific study undertaken specifically to determine costs of doing business and was a national study that did not take into account petitioners' particular local circumstances (i.e., being in an area with discount liquor stores and having to utilize a lower markup to compete). Petitioners assert that the auditor's calculations utilizing petitioners' Federal tax returns to calculate a markup percentage tending to show the auditor's markup was correct, were deficient because the gross sales reported on the Federal returns included lottery sales. Also, petitioners argue that a markup in a sales tax audit is determined utilizing a taxpayer's actual purchase invoices and sales prices available during the time period the audit is being conducted.

⁹This statement is in conflict with the testimony of James Tian that the water problems occurred throughout 1994 and 1995. Since Zhong Xiang Tian is the president of Good Luck Liquor his statement on the water problems has been accepted rather than the testimony of James Tian.

Petitioners assert that the suppliers' purchase information was overinflated because bills were paid to the suppliers for merchandise that was returned.

Finally, petitioners argue that there is reasonable cause to abate penalties in this case because Zhong Xiang Tian had health problems during the audit period and was required to rely on assistance from relatives who were not familiar with tax laws and because the business records were destroyed by flooding.

31. The Division argues that petitioners failed to provide the auditor with sufficient records to enable an audit to be conducted because all that was provided was Federal tax returns and check stubs for a portion of the period showing purchases, but with no record of cash purchases. Having established the records were insufficient, the Division properly resorted to an indirect method of audit, in this case using the purchase records provided by suppliers and applying a markup from the Dun & Bradstreet study. The Division asserts that its method of audit must be reasonable, but it is not required to utilize the most exact method of audit, and that petitioners' arguments concerning the date of the study are not enough to meet petitioners' burden of showing that the audit was irrational. Furthermore, the Division points to the fact that the markup used in the audit was in line with the markup as calculated from Good Luck Liquors' Federal tax returns as further evidence that the audit method was reasonable.

On the issue of reasonable cause for abating the penalty, the Division argues that petitioners have submitted no actual evidence to prove that there was flooding that could have destroyed the records and that during the entire time the audit was conducted no mention was made of records being destroyed by flood or otherwise. In any event, the Division argues that petitioner Zhong Xiang Tian's statement says the records were destroyed in the latter part of

1996, approximately one year after the Division's initial request for the records on November 8, 1995.

CONCLUSIONS OF LAW

A. There is no dispute that the audit methodology utilized in this matter was an indirect methodology not based solely on the books and records of petitioners. In order for the Division to utilize an indirect methodology, it must show that it made an adequate request for books and records for the entire audit period (*see, Matter of Christ Cella v. State Tax Commn.*, 102 AD2d 352, 477 NYS2d 858), and that it reviewed the records provided in order to determine that the records were inadequate for the purposes of conducting a complete audit (*see, Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978).

The original appointment letter sent by the Division to petitioners constituted an adequate request for books and records and covered the entire audit period currently at issue. This was followed by several other written requests for records, telephone conversations and messages discussing the providing of records and meetings wherein records were requested. The records provided by petitioners consisted solely of Federal tax returns and check stubs for part of the audit period showing purchases made. Petitioners provided no records of cash purchases, even though they stated cash purchases were made. The audit report and the auditor's testimony reflect that the records provided to the Division were reviewed and determined to be inadequate. Finally, at no time during these proceedings have petitioners even asserted that the Division did not make an adequate request for books and records or that they submitted to the Division adequate books and records. Therefore, it was acceptable for the Division to calculate petitioners' tax liability based on estimated or indirect audit methods.

B. Pursuant to Tax Law § 1132(c)(1), petitioners bear the burden of proving by clear and convincing evidence that the tax assessed was erroneous (*Matter of Rizzo v. Tax Appeals Tribunal*, 210 AD2d 748, 621 NYS 2d 115; *Matter of Mobley v. Tax Appeals Tribunal*, 177 AD2d 797, 799, 576 NYS 2d 412, *appeal dismissed* 79 NY2d 978, 583 NYS2d 195; *Matter of Surface Line Operators Fraternal Line Organization v. Tully*, 85 AD2d 858, 446 NYS2d 451). Furthermore, a presumption of correctness attaches to a notice issued by the Division, and the taxpayer must overcome this presumption (*see, Matter of Suburban Carting Corporation*, Tax Appeals Tribunal, May 7, 1998, citing *Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed* 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398).

C. Petitioners have not met their burden of proof of showing that the Division's determination of tax due was incorrect or that the audit method was unreasonable.

The Division may resort to an estimated or indirect audit method to calculate sales tax due where a taxpayer has failed to present books and records adequate for the Division to conduct a detailed audit (*see, Matter of Urban Liquors v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138). While the method chosen by the Division must be reasonable (*see, Matter of House of Audio of Lynbrook, supra*) and reasonably calculated to reflect the taxes due (*see, Matter of W.T. Grant v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75; *Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91), the method need not be exact (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454) and the auditor is given considerable latitude in devising an audit method (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

In the present case the auditor, having no sales records available, utilized purchase records obtained from suppliers. From these records she calculated the total amount of purchases made by Good Luck Liquor for the audit period. The auditor then allowed a 1% deduction from those purchases to account for inventory lost due to theft since petitioners alleged some amount of theft had occurred during the audit period. She also deducted the amount listed as ending inventory on Good Luck Liquor's 1994 Federal tax return since what is left in inventory was obviously not sold during the audit period. To this total adjusted purchases figure the auditor applied a markup percentage, derived from a Dun & Bradstreet study. The auditor then adjusted the markup 3% downward to account for petitioners' assertions that they were a high volume, low markup business. Sufficient evidence exists in this record to enable me to determine that the Division has established a rational basis for this audit (*Matter of Grecian Sq. v. New York State Tax Commn., supra*). Therefore, it is incumbent upon petitioners to show by clear and convincing evidence that the audit method was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679, 681).

The use of the Dun & Bradstreet study to determine the markup is allowable (*see, Shukry v. Tax Appeals Tribunal*, 184 AD2d 874, 585 NYS 2d 531). This is true even though, as pointed out by the petitioners, the study was for a time period not within the audit period (*see, Matter of The Humphrey House*, Tax Appeals Tribunal, July 31, 1997) and the study was a national study (*see, Matter of Bitable on Broadway*, Tax Appeals Tribunal, January 23, 1992 *confirmed* 199 AD2d 633, 604 NYS2d 990). The Division introduced the study used into evidence in this matter, allowing petitioners to determine by whom the study was published and the data on which the study was based, thus providing them the opportunity to refute the study with evidence of their own (*see, Matter of Bitable on Broadway, supra; Matter of Fokos*

Lounge, Tax Appeals Tribunal, March 7, 1991). Petitioners presented no evidence in support of their position that using a study of the year 1984 was unreasonable, and the only evidence presented on the issue of a national study being unreasonable was the testimony of James Tian that his father told him, due to the competition in the area, Good Luck Liquor used a markup of less than 14%. This certainly does not constitute clear and convincing evidence that use of the Dun & Bradstreet study by the Division was irrational (*cf.*, *Matter of Shop Rite Wines & Liquors*, Tax Appeals Tribunal, February 22, 1991 [where testimony and an industry publication were held sufficient to establish a 7% factor for breakage and theft in petitioner's liquor store]; *Matter of Fokos Lounge, supra* [where petitioners introduced testimony of an expert witness to establish that there was no correlation between its utility usage and its level of business activity])). Indeed, in this case the auditor reduced the markup percentage calculated from the Dun & Bradstreet study by 3% to account for petitioners' assertions that the business of Good Luck Liquor depended more on volume business than markup.

Having determined that the audit method utilized by the Division was allowable, there is no merit to petitioners' argument that the markup should have been determined using its purchase invoices and selling prices available at the time of the audit. While the Division is required to utilize a reasonable audit method, it is not required to use the most exact audit method (*Matter of Markowitz v. State Tax Commn., supra*).

Petitioners' complaints that the purchase information provided by its suppliers was inaccurate also fall short of proving that the audit method utilized by the Division was irrational. Their claim that even had they provided complete books and records to the Division the auditor would have utilized the suppliers' records is simply irrelevant since petitioners clearly did not provide complete books and records. Also irrelevant is petitioners' assertion that the amount of

purchases as recorded by the suppliers was inflated because items were paid for that were actually returned. There is no indication in the record that petitioners provided the Division with any information on this issue during the audit. The audit cannot be held to be unreasonable for failure to include information that was not available to the Division at the time the audit was done (*see, Matter of Continental Arms Corp. v. State Tax Commn.*, 72 NY2d 976, 534 NYS 2d 362; *Matter of Northern States Contracting Co.*, Tax Appeals Tribunal, February 6, 1992).

In support of the reasonableness of the markup utilized by the Division, the auditor testified that the markup was similar to that calculated from Good Luck Liquor's Federal tax returns for same period. Petitioners argue that included in their gross sales on their Federal return were lottery sales of \$18,720.00 per year. While petitioners are correct that this would significantly change their markup as calculated on their Federal returns, this information does not prove that the audit was irrational. First, petitioners failed to introduce any documentary evidence on the amount of lottery sales. James Tian's testimony that there were lottery sales of \$6,000.00 per week is merely his own estimate. Second, having already determined that the audit was reasonable under the circumstances presented, the Division's additional example of the reasonableness of the audit was merely superfluous.

D. Tax Law § 1145(a)(1)(i) imposes a penalty on any taxpayer who fails to pay or pay over any tax within the required time limits, unless the failure to pay the tax was due to reasonable cause and not willful neglect. Reasonable cause may be found where destruction of business records is proven (20 NYCRR 536.5[c][2]). In his statement petitioner Zhong Xiang Tian explains that Good Luck Liquor's records were destroyed by flooding caused by a rain storm in the latter part of 1996. Therefore, Good Luck Liquor's records were in existence not only during the entire audit period, but during most of the time, if not the entire time, the audit

was being conducted. Petitioners made no attempt to explain this apparent contradiction as to why the records were not provided to the auditor prior to their destruction. I therefore find that petitioners have not established reasonable cause for abatement of penalty based on the destruction of business records pursuant to 20 NYCRR 536.5(c)(2).

Finally, petitioner Zhong Xiang Tian's assertion that penalty should be abated because he was required due to injuries to rely on family members to assist in the conducting of the business who were not familiar with tax laws is rejected. Ignorance of the law is not reasonable cause for the abatement of penalties (*see, Matter of Auerbach v. State Tax Commn.*, 142 AD2d 390, 536 NYS2d 557; *Matter of LT & B Realty Corp. v. New York State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121; *Matter of Northern States Contracting Co., supra*).

E. The petition of Good Luck Liquor, Inc. is denied and the Notice of Determination dated November 29, 1996 is sustained.

The petition of Zhong Xiang Tian is granted to the extent set forth in Finding of Fact "24", but is in all other respects denied, and the Notice of Determination dated March 10, 1997, as modified by Finding of Fact "24", is sustained.

DATED: Troy, New York
October 28, 1999

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE